

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

UNITED STATES POSTAL SERVICE

And

34-CA-10146(P)
34-CA-10330(P)

CHRISTOPHER KEATON, AN INDIVIDUAL

Darryl Hale, Esq.,
Of Hartford, Connecticut
For the General Counsel

Anna V. Crawford, Esq.,
Of Windsor, Connecticut
For the Respondent

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge: This case was tried in Hartford, Connecticut on May 20, 21 and 28, 2003. The charge in Case No. 34-CA-10146(P) was filed by Christopher Keaton, an individual, on June 7, 2002.¹ Keaton filed an amended charge in the above captioned case on July 16. The charge in Case No. 34-CA-10330(P) was filed by Keaton on January 2, 2003. An amended charge in this case was filed by Keaton on February 25, 2003. Based on these charges and amended charges, the Region issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein "Complaint") on March 28, 2003. The United States Postal Service (herein "Respondent" or "Postal Service") filed timely Answer wherein it admitted, *inter alia*, the jurisdictional and supervisory allegations of the Complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, provides postal service for the United States and as pertinent to this matter, maintains a facility in Hartford, Connecticut. The Board has jurisdiction over Respondent by virtue of Section 1209 of the PRA. The Respondent admits the jurisdictional allegations of the Complaint and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates are in 2002 unless otherwise indicated.

II. Alleged Unfair Labor Practices

A. Complaint Allegations

5 The Respondent operates a postal facility in Hartford, Connecticut, called the
Washington Street Station. Working there as a letter carrier is Christopher Keaton. Keaton and
the other carriers are represented by the National Association of Letter Carriers, Merged Branch
86, AFL-CIO, (herein "Union"). Respondent and the Union have been parties to successive
10 collective bargaining agreements, the latest of which is effective by its terms from November 21,
2001 to November 20, 2006. It was stipulated that Tom Sullivan is station manager of the
Washington Street postal facility and Ed Desrosiers is Keaton's line supervisor, and that both
are supervisors within the meaning of Section 211 of the Act and agents within the meaning of
Section 213 of the Act. The Complaint alleges that Respondent has violated Section 8(a)(1), (3)
and (4) of the Act by:

15 1. On or about January 17, 2002:

- 20 a. Keaton requested assistance on his route pursuant to the collective
bargaining agreement noted above;
- b. Keaton requested Union representation with regard to a threat of discipline
made in response to the request for assistance on his route described above.

 2. On or about January 17, 2002, Respondent harassed Keaton by:

- 25 " a. denying his request for assistance on his route;
- b. denying his request for Union representation;
 - c. threatening him with suspension.

 3. On or about February 2, 2002, Respondent issued a letter of warning to Keaton.

30 4. On or about December 30, 2002:

- a. Keaton requested assistance on his route pursuant to the collective
bargaining agreement described above; and
- 35 b. Keaton requested Union representation with regard to the denial of the
request for assistance described above.

 5. On or about December 30, 2002, Respondent harassed Keaton by:

- 40 a. denying his request for assistance on his route; and
- b. insisting upon his delivery of his "45 minute handoff."

 6. On or about January 2, 2003, Keaton requested Union representation pursuant to
the collective bargaining agreement described above.

45 7. On or about January 2, 2003, Respondent harassed Keaton by:

- a. denying his request for Union representation; and
- 50 b. threatening him with suspension.

 8. On or about January 2, 2003, Respondent placed Keaton on "Emergency Off-duty
Status" (without pay).

9. On or about February 12, 2003, Respondent issued Keaton a seven-day suspension notice.

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B. Background Facts

As noted above, the U.S. Postal Service operates a postal facility known as the Washington Street Station in Hartford, Connecticut. There are two separate delivery zones covered by this station, zone 20 and zone 6. As pertinent, Christopher Keaton works as a letter carrier in zone 20 with seven other regular carriers and two utility employees. The two utility employees cover the scheduled off days for the regular carriers. Keaton's immediate supervisor is Edward Desrosiers. Zone 6 has forty nine regular carriers. There are two zones in the station because the station covers two zip codes. There are separate Union stewards for the two zones and only zone 6 has alternate stewards. Brian Gworek is the only steward for zone 20. If an employee in zone 20 wants a steward and Gworek is not working that day, Sullivan schedules a time to see him the next work day. If discipline is planned for an employee, it is not implemented until a steward is available. Sullivan never has used a zone 6 steward to address issues in zone 20.

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A carriers work day is split between office time and street time. During the office time, the carrier cases or prepares mail for delivery and the street time is the delivery process. A carrier like Keaton is expected to be in the station for about two hours to two and a half hours in the morning, and then leave for deliveries. Each carrier's route has been studied and Sullivan can find a carrier on his or her route at any given time.

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The Postal Service maintains what it calls an Overtime Desired List. This list is prepared quarterly and is voluntary. Overtime is assigned first to the carriers on the list with the lowest hours and then by seniority. Pursuant to an arbitration decision, the Station can go off the list on a daily basis and assign overtime to the most junior carriers to complete deliveries within the station's set operating hours for delivery. The decision also allows the service to use carriers not on the overtime desired list.

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Sullivan and his supervisors make a daily determination about using overtime based on the volume of mail. This determination is usually made at about 9:00am. Postal Service Form 3996 is used by carriers to request auxiliary assistance on their routes or to avoid overtime. The carrier is supposed to explain the reason for the request on the form. For example, if their volume of mail exceeds norms for a given day, they must point this out specifically. The carrier also estimates how much extra time the volume requires. Management then decides whether the request is valid and if so, grants the request or curtails deliveries of junk mail on the route to the next work day. If management believes the carrier is incorrect in his or her assessment of the volume of mail, they will deny the overtime or assistance request. Sullivan has denied such requests from Keaton and other carriers in the station. He testified that at one time or the other, he has denied such requests for all carriers in the station. He has had carriers other than Keaton request a steward after a denial of a form 3996 request. This usually involves Gworek or another steward approaching him telling him a carrier is upset with the denial.

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If a carrier returns from his or her route with undelivered mail, the carrier fills out a Form 1571. The carrier specifies what mail was not delivered and the reason why it was not delivered. Management then signs the form and notes action taken with respect to the undelivered mail. Usually, management will direct the carrier to go back on the street and deliver the mail. Only in personal emergency situations will management not require the carrier

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to return to complete deliveries. Bringing back mail can result in discipline and carriers have been informed that this may happen. Carriers were also told that they are to obey a direct order to return to the street and grieve the order later.

5 Keaton has worked for the Postal Service for fifteen years. His hours are 8:00am to 4:00pm, Monday through Saturday, with Friday and Sunday off. Regular employees from one zone cannot be used to perform overtime in the other zone. Keaton has not been on the Overtime Desired List since August 2001. He has had a medical restriction limiting his hours to eight a day since August 2002. This is in writing and was supplied to Desrosiers. Most of
10 Keaton's problems with management have in one way or another involved his occasional refusal to work overtime and engaging in confrontations with management. General Counsel contends that Keaton has been harassed and discriminated against over a period of time because of his active use of the Union's grievance procedure, his filing of charges with the Board, and an internal Postal Service EEO complaint Keaton filed against a former station
15 manager. This use of the grievance procedure and Respondent's alleged animus because of that use predates the Complaint allegations and also includes incidents which occurred within the time frame encompassed by the Complaint, but which are not alleged as violations of the Act.

20 The earliest example of Keaton's problems with management occurred in 1999. In November of that year, he won a grievance over being forced to work overtime when he was not on the overtime desired list. Before Sullivan became station manager in the fall of 2001, Keaton's former station manager was Ed Madison. In 1999, Keaton filed a grievance against Madison over forced overtime. In that same year, Keaton filed two grievances against Madison
25 over supervisory conduct by Madison. He also filed an EEO complaint about Madison.

According to Keaton, on April 6, 2000, He was called to a meeting with Madison and Sullivan. At the time Sullivan was working in a postal facility in Newington, CT. Madison called for an employee named Mark Sanawich and appointed him alternate Union steward. Madison
30 wanted to discuss some incidents on Keaton's route. Keaton objected to Sanawich's role and asked permission to call the Union hall. Madison refused. Madison began discussing mail that Keaton had brought back. Keaton began arguing with Madison and Sullivan told him to stick to answering questions or he could get in a lot of trouble. After some more confrontational remarks by Madison and Keaton, Keaton asked Sullivan why he was there. Sullivan told him that he was
35 serving as Madison's witness. Keaton then brought up his pending EEO case against Madison. Madison told Keaton that the EEO case was dead. Madison then ended the meeting. Keaton called the Union hall. The Union investigated and sent a letter pointing out Madison's error in not allowing Keaton to call the Union Hall when he first asked. Keaton then filed what he calls a pre-complaint with EEO about the April 6 incident.

40 The General Counsel's contention that Keaton was discriminated against as alleged in the Complaint was motivated by Keaton's protected concerted activity or union activity and Respondent animus just does not have merit. None of Keaton's activity as related by the
45 evidence was concerted protected activity. All of his actions were taken by him alone to satisfy personal needs. His most serious use of remedies afforded by the parties' collective bargaining agreement was his filing of an internal EEO complaint against Madison. However, all of the alleged violations of the Act were committed at the direction of Sullivan. Madison was totally out of the picture when these actions took place. Moreover, there was no showing that Keaton filled
50 an abnormally large number of grievance as compared to other letter carriers in the affected postal facility or that his discipline was more severe than meted out to other carriers who engaged in activities similar to Keaton's. With respect to the alleged Section 8(a)(3) violations,

Keaton actually did engage in activity in violation of the Postal Service policies and rules. Management did not manufacture reasons to discipline or harass him. When I heard the case and after reading the record, I believe a far more likely motivation for Respondent's actions toward Keaton was Keaton's on the job behavior and not Union animus.

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C. The January 17, 2002 events

The events of January 17 were testified about by several witnesses, with some differences depending upon whom was offering testimony.

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Sullivan testified that on January 17, 2002, he was covering for Supervisor Desrosiers who was off that day. He testified that at that time and up to the present, Keaton's route involved a forty five to forty nine minutes handoff. That means that much of Keaton's mail is given to another carrier. Keaton carries this mail but does not deliver it. On the 17th, Keaton filed a form 3996 request for assistance at about 9am. He asked for forty five minutes initially. After Sullivan denied the request, Keaton modified it to seek 30 minutes of assistance. Sullivan decided Keaton did not need assistance to complete his route in the normal work day after looking at the volume of Keaton's mail. According to Sullivan, Keaton was the only carrier in the station requesting assistance that day. Sullivan, after denying the request, told Keaton to leave the station at his normal time. Keaton argued with him, and Sullivan gave him a direct order to leave the station at 10:16 am and finish his deliveries even if the need to work overtime arose. Though Keaton was not on the Overtime Desired List and had a medical restriction against working over eight hours, he had been working overtime occasionally up to fifteen or twenty minutes to complete deliveries. Keaton continued arguing and asked to see a steward. Gworek was not at the station and Sullivan told him he could see a steward the next working day. Sullivan repeated his order for Keaton to complete his deliveries that day. Keaton finished his preparation for the day and loaded his truck. He then came back to Sullivan and again asked for a steward. Sullivan ordered him to leave and begin deliveries. Sullivan advised Keaton of the consequences of failing to obey a direct order.

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According to Sullivan, at about 3:00 pm that day, Keaton called him and told him he was going to come back to the station with about a half hours undelivered mail. Sullivan soon after encountered letter carrier Robin Adams and told her to find Keaton and relieve him of the mail he was going to bring back. Sullivan did not see or speak with Keaton that day after the phone conversation.

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The following day, Sullivan told Desrosiers about the events of the 17th and Desrosiers conducted a Pre-Disciplinary Investigation (PDI) with Keaton and Gworek. Desrosiers and Sullivan decided that discipline was called for. Other carriers shown to have received discipline for failing to follow a direct order are John Enes, Bill Erickson, Anthony Douglas, Mark Eastmond and Vinnnie Martinelli. In September 2002, Sullivan suspended carrier Joe Blair for returning with undelivered mail and becoming belligerent. He was sent home under the emergency placement policy. Under this policy, an employee is suspended immediately and ordered to leave the facility. Martinelli, Douglas and Erickson were disciplined for returning with undelivered mail and refusing an order to return to their routes and finish their deliveries. Ericson was given a fourteen day suspension for a subsequent refusal to return to his route and finish deliveries. Three other carriers, John Milardo, Mark Eastman and John Enes were similarly disciplined for failure to follow an order to finish their deliveries. These disciplines were issued for conduct by the involved individuals on or about December 30, 2002.

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Keaton offered testimony about these events. He testified that prior to January 17, 2002,

Sullivan had never ordered him to go back out and deliver mail. Prior to February 2, 2002, he had never been disciplined for bringing mail back to the station. On January 17, 2002, Keaton submitted a form 3996 requesting thirty minutes of assistance on his route for that day. Sullivan disapproved this request. According to Keaton, Sullivan told him to go on his route and if he returned with mail, he would be suspended. Keaton then requested to speak with his union representative. Sullivan denied this request and again told Keaton to start his route. Keaton loaded his vehicle and then went back to Sullivan again asking to speak to a Union representative. Sullivan again denied this request and told him to leave. About the middle of the afternoon, Adams showed up and told him Sullivan had asked her to take whatever mail Keaton could not deliver in eight hours. Keaton denies talking to anyone at the Washington Street station after leaving in the morning. I credit Sullivan's testimony over that of Keaton in this regard. If Sullivan did not speak with Keaton how would he know he was returning with undelivered mail.

Georgia Hall is employed by the Postal Service as a sales and service representative at the Washington Street facility. In her job, she deals with undeliverable mail at the facility. She collects mail deemed undeliverable by the letter carriers and verifies the status of the mail. She sits at a desk in the middle of area in which the carriers prepare the mail for delivery. The desk is about 20 feet from where the carriers work. Her desk adjoins that of Supervisor Desrosiers. During the week of January 6, 2002, she overheard a conversation between, Desrosiers and Sullivan. It occurred about mid-morning. The two men were standing near where Keaton cased or prepared his mail for delivery. She testified that she heard Sullivan instruct Desrosiers to fire Keaton if he came back with mail that day.² She testified that she heard nothing preceding this statement in the men's conversation. Management took no action against Keaton during the week of January 6.

On January 17, Hall overheard a conversation between Sullivan and Keaton. According to Hall, Sullivan told Keaton to get out and deliver his mail, threatening him with suspension if he brought any mail back. Keaton asked to speak to a Union representative and Sullivan told him to leave and deliver his mail. I credit both Hall's and Keaton's assertion that Sullivan threatened Keaton with suspension if he failed to follow instructions on January 17. On the other hand, Keaton was not in imminent danger of being suspended unless he failed to deliver his mail or failed to offer a good excuse for not doing so.

On January 19, 2002, Keaton was called in to meet Desrosiers in a PDI. Union Steward Brian Gworek was present. According to Keaton, Desrosiers asked why Keaton had brought mail back on January 17. Keaton denied that he had brought any mail back that day. This surprised Desrosiers. Keaton then told him he was denied Union representation in the morning and the meeting ended. Gworek testified that Desrosiers alleged that on January 17, Keaton had disobeyed an order to complete all of his deliveries, had brought mail back to the station and disobeyed an order to go back out and finish his deliveries. Gworek thought this strange because Keaton had not brought back mail as Robin Adams had completed his deliveries. There was no mention of a phone call. After the PDI, Gworek spoke with Sullivan. He told Sullivan what Desrosiers had alleged and Sullivan agreed that it was not quite right, but would have been if he had not sent Adams to meet Keaton.

On or about February 2, 2002, Keaton received a written warning from Desrosiers. It

² Hall gave two affidavits during the investigation of this case. The first, given September 17, 2002, does not mention this conversation. A second statement given by her in January 2003 does speak to this conversation.

states, in pertinent part:

“On Thursday, January 17, 2002, at approximately 10:00am I informed you that you would need to complete the deliveries on Route 2013. You responded that you were not going to work overtime as you were not on the overtime-desired list. I informed you that your services were needed and I had already given overtime to those people on the “overtime-desired list” and that you as the junior Regular were to complete your route even if you had to go into an overtime status. I then gave you a direct order to complete the deliveries in question. I also reminded you that you did not have the right to delay the mail. You repeated your position that you were not going to work overtime. You not only did not finish your route as directed, you brought back approximately 30 minutes of deliveries and again disobeying management’s directive to return to the street to complete your deliveries.”

“During the pre-discipline interview held with you and the Union official responsible for 06120, Brian Gworek, you alluded that management was harassing you because of incidences which had occurred a year and a half ago to two years ago between you and another supervisor. Since that discussion you have not brought forth any evidence that would add merit to your claim. Your arguments completely avoided the charges of your failure to follow the instructions you received on January 17, 2002. “

“I find your actions on January 17, 2002 to be unacceptable. You offered no acceptable explanation for your actions. Postal employees are expected to respect authority and follow the instructions of supervisory officials. No employee has an unfettered discretion to disobey or ignore instructions.”³

The warning then details the written rules governing the situation and states that a reoccurrence of the incident would result in more severe discipline. The Postal Service rules that Keaton is accused of not following are Handbook M-41, Section 112.21, “Obey the instructions of your manager” and Employee Relations Manual Section 666.51, “Employees must obey the instructions of their supervisors. If an employee has reason to question the propriety of a supervisor’s order, the individual will nevertheless carry out the order and immediately file a protest in writing to the official in charge of the installation, or appeal through other channels.”

Keaton grieved this warning.

This grievance was resolved in management’s favor on April 11, 2002, finding, inter alia:

“Management claims and the Union does not dispute the fact that the grievant called the office on the afternoon of the 17th informed management that he would be returning back to the office with a half-hour of undelivered mail. At that point management gave the grievant a direct order to stay on his route and complete all deliveries even if he had to go into overtime. The grievant refused again stating that he would be returning to the office. Shortly thereafter, management found a carrier on break. The other carrier was instructed to proceed to route 2013 to see if she could locate the grievant and was given approximately ½ hour to deliver off the grievant’s route.”

“The grievant should have followed the instructions and if he felt it necessary to appeal

³ Desrosiers obviously wrote this warning as if Sullivan were writing it.

the instructions "later" he could have done so through the grievance/arbitration procedure."

By letter dated March 4, 2002, the Union advised Sullivan that Keaton had alleged that Sullivan had denied him Union representation and that Sullivan should not advise Keaton or other members that they are not entitled to representation for each and every request made. The letter also notes Keaton's accusations of harassment by Sullivan. Though Keaton requested Gworek to file one, there was no grievance filed over Sullivan's alleged refusal to permit Keaton to have Union representation on the 17th of January. In June, Gworek told Keaton that the Union's Executive Board did not feel this grievance would have merit. Keaton then filed a charge with the Board against the Union for its refusal to file such a grievance. The Region refused to issue a Complaint in this matter. Yet it did issue one against Respondent for failing to provide a steward on January 17.

D. Actions Taken Against Keaton Between February 2002 and December 30, 2002

Respondent took certain adverse actions against Keaton during the time between the events alleged in the Complaint to be violations of the Act. For whatever reason, these interim events are not alleged to be violations.

1. The Failure to Deliver Mail in March 2002

The Postal Service in Hartford, Connecticut delivers so-called "short takes." These are advertising supplements to the local Hartford newspaper. The newspaper has the Postal Service deliver them to certain business that do not subscribe to the newspaper. Prior to March 23, 2002, undeliverable short takes were discarded without reasons being given for discarding them. Certain short take addresses prove to be vacant so that delivery is not possible.

In early 2002, as part of a regular procedure to study routes for possible realignment, a check was made on three days, February 28, March 14 and 21, of discarded short takes. Three routes appeared to have an excessive number of undelivered short takes. They were the routes of Keaton, Robin Adams and Mark Zanawich. On March 21, Sullivan and another supervisor walked these routes and check addresses to determine if the short takes were truly undeliverable. The Union was asked to participate in this check, but declined to take part.

Adams testified that on or about March 23, 2002, letter carriers began to be required to write on their undelivered short takes the reasons why they were not delivered. On March 26, 2003, there was meeting of letter carriers called by Sullivan. The carriers in the facility had seen Zanawich called into Sullivan's office and were curious as to what was happening with him. Sullivan gathered the carriers in a circle. Sullivan told them that Zanawich has thrown away some apparently deliverable short takes, and having heard his explanation and checking it out, that nothing was going to happen to him. The carriers asked about Keaton who had been suspended for throwing away short takes. Sullivan said he could not talk about that and the meeting ended.

According to Sullivan, the walks made by him established that Adams had correctly discarded her short takes. Zanawich had what Sullivan described as a minimal number of incorrectly discarded short takes and was counseled.

On March 23, 2002, Sullivan held a PDI with Keaton and Gworek. Keaton was asked to

explain discrepancies in the number of short takes discarded on the dates listed above. Keaton said all discarded short takes on his route were due to vacancies or businesses that did not want them. Keaton was then placed on emergency suspension without pay. Keaton was accused of throwing away deliverable short takes, stating that an investigation had taken place.

5 Keaton was given a letter signed by Sullivan which placed him on suspension without pay. It states that the "reason for this action is due to allegations of inappropriate conduct in that your actions on March 21 demonstrate that your retention on duty could result in the loss of mail." He remained in suspended status for a week and a half.

10 Gworek testified that management gave him a list of twenty eight addresses it contended that Keaton failed to deliver short takes on the three days he was accused of throwing them away. Gworek further testified that the Union conducted its own investigation and found that with the exception of four addresses, all were addresses of vacant buildings. He testified that Zanawich was given the opportunity to re-deliver the short takes he failed to deliver. He also

15 testified that carriers had been fired in the past for failure to deliver mail.

The matter was grieved and resolved by putting Keaton back to work without back pay. The resolution states that the suspension will remain part of Keaton's personnel file for two years, and management will not further discipline Keaton for allegedly discarding mail on

20 February 28, March 14 and 21, 2002. The Union agreed not to pursue the grievance further. Keaton testified that he received unemployment compensation for the time he was suspended. On April 4, 2002, Gworek and Keaton spoke with Desrosiers about a procedure for dealing with short takes that were not deliverable. Desrosiers instructed Keaton to note why a particular short take was being discarded and initial it. Keaton testified that since that date, he has

25 followed Desrosiers' instruction in this regard.

2. Sullivan and Keaton have a Confrontation on July 8, 2002

According to Keaton, on July 8, 2002, he submitted a form 3996 requesting assistance

30 to Sullivan. He had just returned from vacation and certain work had stacked up. Sullivan denied the request and instructed Keaton to go out on his route and not bring any mail back. Keaton asked to be given back his form 3996 and Sullivan refused to give it to him. Keaton called over carrier Steve Lindee to be a witness and Keaton again asked Sullivan for his form back. Sullivan ordered Keaton back to his case and he resumed work. According to Sullivan, when he refused

35 Keaton's request for assistance, Keaton became upset and moved away from his work station. Sullivan ordered him back to work and Keaton instead called out the name of a co-worker to witness what was happening. Keaton began talking back to Sullivan and creating a disruption in the work area. Sullivan again ordered Keaton back to work and left to get Gworek. He instructed Gworek to get Keaton and come to Sullivan's office. When they arrived, Sullivan told them he

40 was not going to tolerate grandstanding and Keaton was not to engage in similar behavior in the future.

According to Keaton, at this meeting Sullivan was mad and threatened to fire him if he "showed him up" again on the floor. Gworek testified that at the meeting, Sullivan told Keaton not to

45 disrupt the workroom floor and not to grandstand. Sullivan then disapproved the form 3996 in writing and threw it on the desk. Keaton was offended and refused to take it. Sullivan then ordered Keaton to do his route and not bring anything back, even if it meant overtime. He did work overtime and completed his deliveries.

50 The Union filed a grievance over Keaton being forced to work overtime on July 8. It was

settled with the Postal Service paying Keaton the penalty overtime rate for the overtime he worked on July 8. ⁴

E. The Events of December 30, 2002 and January 2, 2003

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Desrosiers testified that on December 30, he had a great deal of overtime to assign and wanted Keaton to complete his route without his usual 45 minute handoff. Because of Keaton's volume that day, Desrosiers believed he could complete his deliveries without working overtime. He advised Keaton to curtail his short takes if necessary to complete delivery of regular mail. Keaton complained that he was not on the overtime desired list and Desrosiers told him he could do his deliveries without overtime. Shortly thereafter, Keaton submitted a form 3996 requesting help on this route that day. Desrosiers denied it. Keaton returned about 4:30 pm, with about 45 minutes of mail undelivered. Desrosiers instructed him to go back out and deliver this mail. Keaton ignored this instruction.

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Keaton testified that on December 28, 2002, he filled out a form 1571 noting some mail he had not delivered. On December 30 he filled out a form 3996 requesting one hour of assistance that day. It was disapproved by Desrosiers. Keaton then requested a steward. Desrosiers said he could have five minutes to speak to Gworek. Keaton told Gworek he feared that if he took all the short takes as demanded by Desrosiers, he would end up with a nine and a half hour route. Gworek approached Desrosiers and explained that Keaton had a medical restriction and could not work more than eight hours. Desrosiers countered that the medical restriction had expired and that he had never seen it. Gworek then pointed out that Keaton was not on the overtime desired list. Desrosiers then told Keaton to follow his instructions. He returned that day with some mail not delivered. He filed out a form 1571 for the undelivered mail and left the form on Desrosiers' desk. Keaton then went to Sullivan's office and found Sullivan and Desrosiers. Desrosiers signed the form 1571 noting that Keaton had refused to go out and finish his deliveries.

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On January 2, 2003, Keaton approached Sullivan in the morning and asked Sullivan if he were aware that a bundle of old undelivered mail had been left at his case and that some of his good mail had been placed in the waste container.⁵ Sullivan told him that Georgia Hall had instructed him that good mail from three routes had been put in the container. Sullivan assured Keaton he was not blaming him and instructed Keaton to go to work. Keaton became belligerent and accused Sullivan of setting him up. Sullivan denied the accusation and told Keaton to return to work. Keaton continued to argue with him. Then Keaton asked for a steward. Gworek was not working that day and Sullivan told Keaton that he did not need a steward. He instructed Keaton to return to work again and again Keaton failed to follow the instruction. Keaton then asked to speak with the stewards on route 6 and Sullivan told him that they were not his stewards.

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Sullivan threatened that Keaton would be sent home if he did not return to work. Keaton again

⁴ The Union also grieved Managements instructions to Keaton on April 2, 2003 to work overtime even though he had valid medical restrictions prohibiting overtime. On April 2, Keaton returned to the station after eight hours with fifteen minutes of mail undelivered. Sullivan directed him to return to his route and complete it. Keaton returned to his route and completed it. The grievance was settled with management agreeing not to order Keaton to perform work in violation of his medical restriction.

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⁵ Keaton believed the bundle of mail he found at his case was the mail he had not delivered on December 28.

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refused to go to work and Sullivan sent him home.

Cindy Mendez is a carrier for the Postal Service. As pertinent, she was an acting supervisor at the Washington Street Station on January 2, 2003. She overheard a conversation that day between Keaton and Sullivan. According to Mendez, Keaton asked to call a Union "cage".⁶ Sullivan told him, "Not right now." Keaton pointed out two alternate stewards nearby and again asked to be able to speak to one of them. Sullivan denied the request and according to Mendez, Keaton continued to request to speak to a steward. Sullivan ordered him back to his work station three or four more times. The conversation ended when Sullivan ordered Keaton to go home. She testified that during the conversation, Keaton became loud. Keaton gave Sullivan no reason for wanting to speak to a steward.

Keaton denied that he disrupted the work floor. Keaton stayed out of work until January 14 with an anxiety attack. On January 15, 2003 he had a PDI with Desrosiers and Gworek. Desrosiers had questions about why he did not deliver all the mail on December 30 and questioned him about disrupting the work floor on January 2, 2002. The Union filed grievances over the refusal to let Keaton call a Union representative on January 2 and for sending him home. On February 3, 2003, the grievances were settled with Keaton receiving back pay for January 2, 2003. With respect to the issued of refusing to allow Keaton to speak to a Union representative, the settlement states:

"Management will not deny an employee the opportunity to speak with a Union representative in his/her station, and/or telephone the Union office to speak with a representative if there are none available in his/her station. If management reasonably denies an employee either of the above, management must inform said employee when he/she will be able to speak with a Union representative. Except in emergency situations, an employee must not be denied an opportunity to briefly speak with a Union representative during his/her tour of duty."

On February 12, 2003, Keaton was given a seven day suspension for failure to follow instructions and deliver all his mail on December 30, 2002, failure to follow instructions on January 2, 2003, causing a disturbance on that day. The suspension is a working suspension and does not cause loss of pay or time, but may be used as a factor in future discipline. It states that Desrosiers on December 30 instructed Keaton to deliver all his mail, including his hand-off, as Desrosiers believed that Keaton's volume of mail that day did not warrant the hand-off. Keaton was instructed to deliver all the mail even if it meant working overtime. Keaton returned that day with about fifty five minutes of undelivered mail and was instructed by Desrosiers to go back out and finish his deliveries. Keaton punched out and went home instead. The warning states that on January 2, 2003, Keaton approached Sullivan with a bundle of mail and Sullivan told Keaton to return to work. Instead, the warning states that Keaton created a disturbance on the work floor by being loud and walking about. Keaton refused to return to his work station and asked for a Union steward. Sullivan told him the steward was off for the day and that he could see him the next day. Keaton continued to make a disturbance, and was sent home. The warning also stated that Keaton curtailed certain mail on December 30.

This suspension was grieved by the Union and is pending.

F. Discussion and Conclusions

⁶ Mendez used this term as synonymous with Union steward.

It is General Counsel's position that the Respondent's actions in disciplining Keaton for failure to follow instructions and denying him a steward during exchanges over proper work instructions violated Section 8(a)(1), (3) and (4) of the Act. A violation of Section 8(a) (1) is established if (1) the employee's activity was concerted; (2) the employer was aware of its concerted nature; (3) the activity was protected by the Act; and (4) the discipline or other adverse personnel action was motivated by the protected activity.

In cases alleging violations of Section 8(a)(1) and (3) of the Act, which turn on employer motivation, the required evidentiary proof is set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980). Under *Wright Line* and its progeny, the General Counsel must first make a *prima facie* showing sufficient to support the inference that protected activity was a substantial or motivating factor in the challenged employer decision. Mere suspicion that such was the case is not enough. The attendant circumstances must be examined and the "record as a whole" must be examined to determine whether there is motivating union animus." *NLRB v. Benteler Industries*, 1998 U.S. App. LEXIS 15139, (6th Cir.). *Pacific Coast Leagues Pro Baseball Clubs, Inc.*, 2001 NLRB LEXIS 804, 33.

If this is established, the burden shifts to the employer to either rebut the General Counsel's case, or to prove the affirmative defense that the same action would have taken place even in the absence of the protected conduct. *Wright Line, supra*. Although the case law refers to the General Counsel's burden in terms of a "prima facie" case, ultimately, the General Counsel has the burden of persuasion, or proving, that the employee's conduct was a substantial or motivating factor in the adverse action. *Holo-Krome v. NLRB*, 954 F.2d 108, (2d Cir. 1992), quoting *NLRB v. Transportation Management Corp.*, 462 U.S. at 400.

The General Counsel cannot make out a case for protected concerted activity because Keaton's activities were not concerted. From the record evidence, it is undisputed that on two occasions eleven months apart Keaton asked for assistance with his workload, and when this was denied, and he was told to go to work, he argued with management, demanded to talk to a steward, and failed to follow instructions to go out and deliver the mail. Thereafter, when he did not deliver the mail as instructed, he received discipline for failure to follow instructions. This is not a case where the employee "intends to initiate group activity" by his actions. *NLRB v. Caval Tool Division*, 262 F.3d 184 (2d Cir. 2001). Keaton's actions were not "extended to , contemplated, or even referred to group action." *Id.* Keaton's dispute with management on January 17 and December 30, 2002 about whether or not his work load necessitated assistance from another employee bears no "linkage to group action." *Meyers Industries, Inc.*, 281 NLRB 882 (1986). As Keaton's activity was not concerted, there can be no case made on a theory that Keaton engaged in protected concerted activity.

As noted at the outset of this decision, General Counsel's case rests on unproven and I believe unfounded suspicions of Union animus on the part of Sullivan and Desrosiers. There was no evidence offered by General Counsel, that either Sullivan or Desrosiers said anything to Keaton to indicate that the "real" reason for his discipline was because he had asked for a steward, filed internal complaints about his former station manager, or filed Board charges. Sullivan and Desrosiers testified that they would have issued the involved discipline whether or not Keaton had requested Union representation or complained to the Board about discipline he received. There was no showing the involved Postal facility was involved in any labor – management unrest or turmoil, There was no showing by General Counsel that Keaton was treated in a disparate manner from other employees who disobeyed orders, requested union

representation, or acted in a manner contrary to postal rules. Indeed, about the only evidence on this subject was offered by Respondent and indicates that it disciplined other employees who engaged in activities similar to Keaton in a manner similar to Keaton.

5 Given the totality of the circumstances surrounding the incidents of January 17, December 30, and January 2, 2003, General Counsel was unable to show that Respondent's decisions and discipline on these dates were motivated by anti-union animus. As both Sullivan and Desrosiers testified, the amount of time a letter carrier needs to complete his assignments is based on the volume of mail for the specific day. This is not an arbitrary figure determined by
10 management, but rather a number determined by periodic route inspections governed by a collective bargaining process, which establish a reference volume for each route. A computer program also allows management to count the mail received each day, and determine how much time a carrier will need to case his mail on any given day. On each such occasion, his managers determined that, given Keaton's actual mail volume for each day in question, and the
15 amount of time Keaton needed to case this mail, that there would be sufficient time for Keaton to leave the Post Office and complete all of his deliveries within his eight hour shift. This time estimate did not include the time Keaton spent arguing with his supervisors over the matter. However, should the completion of deliveries on any given day require a minimal amount of overtime, it was accepted Postal Service policy that a supervisor or manager could instruct the
20 mail carrier to deliver all of his or her mail, regardless of whether he or she was on the overtime desired list. Indeed, Keaton periodically worked short periods of overtime (15 to 20 minutes) to complete his route, and he agreed that overtime may be required even when he is not on the overtime required list.

25 The Supreme Court noted in *NLRB v. Weingarten*, 420 U.S. 251, 257-258 (1975) that "the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action." Additionally, the Court in *Weingarten* noted that the right to representation does not apply to "such run-of-the mill shop floor conversations as, for example, the giving of
30 instructions or training or needed corrections of work technique." *Id.*, at 257-258, quoting *Quality Manufacturing Co.*, 195 NLRB 197, 199 (1972). The two dates on which a steward was denied in this case involved the giving of instructions, and Keaton was not facing discipline until he failed to follow those instructions. On the record as a whole, the failure to provide a steward was not a violation of the Act.

35 On January 17, Keaton was given specific instructions to maintain his office leave time and to complete his mail delivery assignments, even if it took some overtime. Keaton, however, chose to argue with Sullivan regarding his work instructions, and then demanded to see a steward in connection with his displeasure with the instruction, and thus delayed his departure
40 to deliver mail. Consequently, Keaton failed to complete his assignment within his eight hour shift. Moreover, Keaton's steward was not in the building that day, and the usual procedure in that case was to allow the letter carrier to see him on his next work day.

45 On December 30, Keaton was given specific work instructions for the day to deliver his entire route, including his 45 minute handoff which, given his light mail volume that day, could have been accomplished in eight hours. Desrosiers even instructed Keaton to curtail certain business or junk mail as needed in order to complete his assignment before returning to the station, so that all necessary deliveries would be completed within his eight hour shift. Keaton chose to argue with Desrosiers regarding this work instruction. Keaton next spoke to Gworek,
50 who was working that day. Gworek told him to deliver the mail. Later that morning, Keaton submitted a request for one hour of auxiliary assistance which was denied. In choosing to argue with Desrosiers, Keaton delayed his office leave time by approximately one half hour. Keaton

disobeyed a direct order and did not complete his assignment; rather, he returned to the Station with 55 minutes of undelivered mail. Keaton once again disobeyed a direct order when Desrosiers instructed him twice to return to the street to finish his deliveries. Keaton refused to respond to his supervisor, punched out and went home.

Again, on January 2, 2003, Keaton was given specific work instructions for the day. There is no showing that Sullivan intended to, nor did he express to Keaton when he instructed him to leave the Station and deliver the mail that he planned to discipline him at the time. In fact, Sullivan directly told Keaton that no discipline was being issued to him. The nature of an interaction, whether or not it is simply work instructions or conceivably a pre-disciplinary discussion is not entirely subjective, nor entirely based upon what the employee may guess to be management's real reason for the discussion. Rather, the nature of the discussion is based on the totality of the circumstances surrounding the interaction. *Quality Manufacturing Co., supra*, at 257, fn 5. Management's policy on those occasions when a zone 20 employee wants a Union steward on Gworek's days off is to postpone any adverse action until Gworek is next available. In this case, Keaton's continued refusal to return to work when he was not being accused of anything justified Sullivan's sending him home and not waiting until the next day.

Carriers know their daily leave time and know they are expected to complete their deliveries as this information is provided in their handbooks. Similarly, it is common practice when denying a request for assistance, that management will give a carrier verbal instructions as to how to complete his route within the time allotted. Keaton chose to disobey orders on each occasion, and was disciplined, after a pre-disciplinary interview at which his Union steward was present. Similarly, Keaton was aware of the Postal Service policy (incorporated into the collective bargaining agreement) that employees are to obey instructions and, if necessary, to file a grievance after he or she has complied with the instructions in question.

With regard to the December 30 incident, Keaton spoke to Gworek because he was present at the time. Gworek advised Keaton to follow the instructions to deliver the mail. ⁷Additionally, Desrosiers testified that although he knew Keaton filed an NLRB charge at some point in the past year, he was not familiar with Keaton's activities and was not kept informed of such proceedings. Keaton was aware of Postal Service policy regarding failure to follow direct orders and the consequences for choosing not to do so. Desrosiers issued more severe discipline to other employees for the same infractions, including a fourteen day suspension for failure to follow instructions and returning mail. See Respondents Exs. 8-10.

I believe that it was Keaton's persistent failure to follow instructions and disregard for direct orders which motivated management's actions in this case. Management's frustration with an employee who disobeys normal work instructions does not reflect anti-union animus. The evidence reflect that Keaton's practice was to return to the Station as much as twenty minutes before the end of his tour with a minimal amount of deliveries he had failed to complete, sometimes as little as five to ten minutes worth, in direct violation of the policy regarding completion of daily deliveries. ⁸ Respondent would then have to pay another carrier approximately ½ hour of overtime to complete the few deliveries that Keaton could have made

⁷ Assuming, *arguendo*, that the discussions on January 17 and January 2, 2003 were not simply work instruction discussions, employers are not required to get another representative if none is available. Respondent's policy is to postpone the discussion until the employee's designated representative is available unless the employee chooses to proceed without representation. *Pacific Gas & Electric*, 253 NLRB 1143 (1977).

⁸ See transcript page 425.

within his eight hour shift, but failed or chose not to. See *Santa Rosa Blueprint Service*, 288 NLRB 762 (1988).

Also as noted earlier, General Counsel did not offer any substantial evidence to prove the Respondent tolerated the same conduct from any other employee. See *GHR Energy Corp.*, 294 NLRB No. 76 (1989). The only competent evidence of record shows that similarly situated employees were treated the same or more severely than Keaton, and that discipline for failure to follow instructions was consistently issued to carriers at the involved Postal facility. Desrosiers testified that he issued similar and more severe discipline to other carriers for failure to follow direct orders not to return with any mail, and specifically, for returning mail on December 30, 2002.⁹ Sullivan also testified that he has issued similar discipline to other carriers under circumstances similar to Keatons.

As noted earlier, Keaton testified that he was almost discharged for discarding mail in March 2002. His Union was able to negotiate a nine day suspension for him instead. He also had to be called into Sullivan's office for insubordinate behavior on July 8, 2002, and was instructed to stop "grandstanding" on the work room floor. Neither of these two incidents are alleged to have been violations of the Act and I find no reason to question the actions of Respondent in these regards.

I find that General Counsel has failed to make a *prima facie* showing of protected concerted activities by Keaton, anti-union animus, retaliation for filing charges with the Board, or that Respondent's actions taken toward Keaton were motivated by anything other than legitimate business reasons. I have heretofore found that Respondent's refusal to provide Keaton Union representation on the occasions in question did not violate the Act. Accordingly, I will recommend that the Complaint be dismissed.

Although I am recommending dismissal of the Complaint, in the event that the Board ultimately comes to a different view, I believe the matter in question in this case should be deferred to the parties grievance-arbitration procedure. The Board held in *Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985), that the deferral principles under *Collyer Insulated Wire*, 192 NLRB 837 (1971) "apply equally to settlements arising from the parties' contractual grievance/arbitration procedures because they further the national labor policy which favors private resolutions of labor disputes." Where appropriate safeguards are satisfied, the Board held that it would pursue a "policy of full, consistent and evenhanded deference to the deferral process." *Id.* The Board in *Alpha Beta* consequently deferred to the settlement agreement of the parties. Although the bargaining unit members apparently had voted on the settlement, this fact does not appear to have been dispositive in that case, though it was a factor.

The Board has previously held in a case in which, *inter alia*, a challenged suspension was settled short of the grievance-arbitration procedure, that 8(a)(1) and (3) charges "should be deferred to the grievance and arbitration procedures of the contract where there is evidence of a workable and freely resorted to grievance procedure, and no hesitation or reluctance by Respondent to adhere and to comply with the grievance and arbitration provisions." *United States Postal Service and New Haven, Conn. Local, American Postal Workers Union, AFL-CIO*, 210 NLRB 560, (May 10, 1974), citing *United Aircraft Corporation and Local Lodges #1746, 743 and 700 et al*, 204 NLRB No. 133 (July 10, 1972).

With regard to violations of Section 8(a)(3), the Board in *Spielberg Manufacturing Co.*,

⁹ See transcript pages 410-411, Respondent's Exs. 5-11.

112 NLRB 1080, 1082 (1955) held that charges should be deferred to the grievance and arbitration terms of the collective bargaining agreement when:

5 The proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act. In these circumstances we believe that the desirable objective of encouraging the voluntary settlement of labor disputes will best be served by our recognition of the arbitrator's award.

10 See also *Collyer Insulated Wire, supra*, at 838 ("The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective bargaining agreements that provide for final and binding arbitration of grievances and disputes arising thereunder, 'as a substitute for industrial strife,' contribute significantly to the attainment of this statutory objective.") (citing *Carey v. Westinghouse Electric Corp.*, 376 U.S. 261, 271 (1964)).

20 As noted in the record, Keaton grieved the January 17, 2002 incident and the related February 2, 2002 Letter of Warning. The Letter of Warning grievance was determined to be without merit by the parties' collectively bargained "Step B" team. Additionally, Keaton's Union steward, Gworek, informed Keaton on June 6, 2002, that the Union had refused to grieve any lack of Union representation on January 17, 2002 because the grievance lacked merit. On August 22, 2002, Region 34 agreed that the Union had acted properly and dismissed charges Keaton filed against his Union for its actions on June 6, 2002. Keaton is still in the process of grieving the suspension he received for this incident, but two other grievances related to these incidents have been settled.

30 As the grievance-arbitration procedure is in active use with regard to Keaton's claims, and his Union has entered into settlements, it seems contrary to national labor policy to continually relitigate these matters beyond the parties' resolutions. With regard to the charges stemming from the December 30, 2002 and January 2003 incidents, I believe these should be deferred and the Board should defer to the settlements already reached by the parties with regard to the other incidents, in the event the Complain herein is not dismissed.

Conclusions of Law

- 40 1. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 45 3. The Respondent did not commit the unfair labor practices alleged in the Complaint and thus, did not violate the Act in manner alleged in the Complaint.

50 On these findings of fact and conclusions of law and on the entire record, I issue

the following recommended¹⁰

ORDER

The complaint is dismissed.

Dated, Washington, D.C.

Wallace H. Nations
Administrative Law Judge

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.